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NO. A-152

Supreme Court, U.S.
FILED
OCT 22 1993
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1993

LOIS A. FISHER,

Petitioner

v.

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S APPENDIX

Lawrence S. Schwartz*
Stephen J. Edelstein
SCHWARTZ SIMON EDELSTEIN
CELSO & KESSLER
293 Eisenhower Parkway
Suite 300
Livingston, New Jersey 07039
(201) 740-1600
Attorneys for Petitioner

*Counsel of Record

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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5473 and 92-5497

LOIS FISHER, Appellant in 92-5473

v.

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY
Appellant in 92-5497

On Appeal from the
United States District Court
For the District of New Jersey
(D.C. Civil Action No. 90-00503)
District Judge: Honorable H. Lee Sarokin

Argued May 17, 1993

BEFORE: STAPLETON, ALITO, and SEITZ
Circuit Judges

JUDGMENT ORDER

After consideration of the

contentions raised by appellant, it is

ORDERED AND ADJUDGED that the

judgment of the district court be and is hereby affirmed.

Costs taxed against appellant.

By the Court,

_____
Circuit Judge

ATTEST:

_____
P. Douglas Sisk, Clerk

DATED: May 27, 1993

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LOIS A. FISHER,	:	Civ. No. 90-503 (HLS)
Plaintiff,	:	OPINION
vs.	:	
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,	:	
Defendant.	:	

Sarokin, District Judge

Before the court is defendant's motion for summary judgment.

Background

This suit concerns allegations of age and sex discrimination in the reappointment, hiring, and salary decisions of Rutgers, the State University of New Jersey ("Rutgers") regarding plaintiff, a former member of its faculty. Plaintiff Lois A. Fisher

applied in February 1984 and November 1984 for a faculty position at Rutgers' Graduate School of Management ("GSM").[1] Plaintiff was not hired by this department. However, plaintiff was hired by the University as an assistant professor in the Department of Business Administration of the Rutgers Faculty of Arts and Sciences-Newark ("FASN"), effective September 1, 1985.

Plaintiff's starting salary was $30,033. In March of 1988, the third year of Fisher's contract, Rutgers considered her for reappointment. The

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1. Fisher received a Ph.D. from the Department of Education of the Social Science Division of the University of Chicago in 1984. Plaintiff had received her A.B. in 1953 from Syracuse University with majors in social studies and secondary education, her M.S.S. at Syracuse's School of Social work in 1958, and a Certificate in Child and Adolescent Psychotherapy from the Chicago Institute for Psychoanalysis in 1966. Plaintiff 12(G) ¶ 1.

departmental committee recommended against reappointment. Subsequent evaluators concurred. Plaintiff challenged her non-reappointment under the grievance procedure established by the collectively negotiated Faculty Contract. Although the cause for the delay is disputed, the parties agree that no hearing on plaintiff's grievance occurred for more than a year after the grievance was filed, and eventually plaintiff withdrew her grievance.

On or about December 9, 1988, plaintiff filed a charge of discrimination with the New Jersey Division on Civil Rights (DCR) alleging sex discrimination. The charge was forwarded to the Equal Employment Opportunities Commission ("EEOC") for filing. On or about April 3, 1988, plaintiff filed an amendment charging age

discrimination as well.[2] Following receipt of a right to sue letter dated November 30, 1989, plaintiff filed the complaint in this case on or about February 1, 1990.

In her complaint, plaintiff alleges age and sex discrimination under Title VII, 42 U.S.C. § 2000e et seq. (Counts I & II), the Age Discrimination in Employment Act, 29 U.S.C. § 621 et seq. (the "ADEA") (Counts III & IV), and the New Jersey Law Against Discrimination, N.J.S.A. 10:5-1, et seq. (the "NJLAD") (Counts V & VI), violations of the Equal Pay Act, 29 U.S.C. § 206(d)(1) (the "EPA") (Count X), and claims based on breach of contract (Count VII), breach of the implied covenant of good faith and fair dealing (Count VIII), public policy

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2. Plaintiff was born on February 22, 1932. Plaintiff 12(G) at ¶ 1.

(Count XI), and due process (Count IX). Plaintiff claims that she was discriminated against by defendants in four ways: (1) in the initial denial of a position at the GSM in February and November 1984; (2) in the setting of her salary as a professor at FASN; (3) in the denial of her reappointment at FASN in 1988; and (4) in the denial of her repeated requests to transfer from FASN to the GSM from 1984 through her nonreappointment at FASN. Plaintiff also contends that defendant breached its contract with her in the manner in which it considered her request for reappointment.

Defendant claims that its decision not to reappoint Fisher was based on reservations shared by all evaluators about her publishing record and teaching effectiveness and on market

considerations. Further, defendant maintains that Fisher's salary range was established before it was known she would be a candidate, and that the salary she was finally offered was based on her qualifications and competitive considerations in the teaching market.

Plaintiff alleges that the reasons proffered by defendant for its decisions were pretextual and that the real reason for her non-reappointment, failure to obtain a job at the GSM, and low starting salary was discrimination on the basis of age and sex. As evidence of pretext, plaintiff alleges that defendants made various misrepresentations to plaintiff about job opportunities and the competition for them, and that younger male applicants less qualified than herself were awarded both positions in GSM and reappointment in her department

at FASN. Plaintiff also alleges that her starting salary was lower than that of similarly situated but less qualified male faculty members. Finally, plaintiff submits statistical evidence purportedly demonstrating that men were more likely to be reappointed than women and younger faculty more likely than older faculty.

Defendant has now moved for summary judgment, claiming that plaintiff has failed to establish a prima facie case of age or sex discrimination because she was not qualified for reappointment nor for positions open at the GSM, and because defendant has proffered legitimate nondiscriminatory reasons for its employment decisions that plaintiff cannot show to be pretextual. Defendant also claims that the statute of limitations bars plaintiff's claims regarding her application to the GSM and

her salary. Defendant contends that plaintiff's contractual claims should be dismissed for failure to exhaust contractual grievance procedures. Finally, defendant claims that plaintiff has stated no cause of action for violation of public policy, the implied covenant of good faith and fair dealing, or due process.

Discussion

Defendant seeks summary disposition of this case. In order to prevail on a motion for summary judgment, the moving party must show that there are no genuine issues of material fact and that, viewing the facts in the light most favorable to the non-movant, the movant will prevail as a matter of law. Fed. R. Civ. P. 56. See, Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Wisniewski v. Johns-Manville

Corp., 812 F.2d 81, 84 (3d Cir. 1987).

Sex and Age Discrimination Claims

McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973), is the starting point for analysis of employment discrimination claims. The McDonnell Douglas analysis has been adopted by the New Jersey Supreme Court to analyze claims under the New Jersey Laws Against Discrimination ("NJLAD"). Clowes v. Terminix International, Inc., 109 N.J. 575 (1988). To establish a claim under the McDonnell Douglas test, a plaintiff must show that:

> (1) she was a member of a protected class;
> (2) she applied, and was qualified, for a job for which the employer was seeking applicants;
> (3) despite her qualifications, plaintiff was rejected for the job;
> (4) following her rejection the employer either hired

> someone from outside of the protected class or continued to seek applicants.

The Third Circuit has modified the McDonnell Douglas test in cases involving tenure decisions. With regard to the qualification element, the plaintiff in a tenure case:

> need only show that [she] was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, [she] need show only that [her] qualifications were at least sufficient to place [her] in the middle group of tenure candidates as to whom a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body.

Roebuck v. Drexel University, 852 F.2d 715, 726 (3d. Cir. 1988) (quoting Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 63 (1st Cir.) (citations omitted), cert. denied, 454 U.S. 1098 (1981)).

McDonnell Douglas Corp. and its progeny, Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 253 (1981); Jackson v. University of Pittsburgh, 826 F.2d 230, 232 (3d Cir.1987), cert. denied, 484 U.S. 1020 (1988); and Jalil v. Avdel Corp., 873 F.2d 701 (3d Cir. 1989), cert. denied, 493 U.S. 1023 (1990), articulate the burden of proof for Title VII cases. Plaintiff has the initial burden of proving by a preponderance of the evidence a prima facie case of discrimination. If plaintiff succeeds in establishing a prima facie case, the burden shifts to the defendant to rebut the evidence of discrimination by articulating some legitimate, nondiscriminatory reason for the employee's discharge.

> The ultimate burden of persuasion, which remains always with the plaintiff, may

> then be met by proving by a preponderance of the evidence that the alleged reasons proffered by the defendant were pretextual and that the defendant intentionally discriminated against the plaintiff.

Jalil, 873 F.2d at 701 (citing Burdine, 450 U.S. at 252-53). The plaintiff may satisfy the ultimate burden of proving discrimination "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." Burdine, 450 U.S. at 256 (citing McDonnell Douglas, 411 U.S. at 804-05).

Under the Equal Pay Act ("EPA") the test is slightly different. Once the plaintiff has established a prima facie violation of the Act, "the burden shift[s] to the defendants to prove by a

preponderance of the evidence that the wage differential was due to . . . any factor other than sex." Brewster v. Barnes, 788 F.2d 985, 991-92 (4th Cir. 1986) (citing 29 U.S.C. §206(d)(1) (1982); quoting Corning Glass Works v. Brennan, 417 U.S. 188, 196-197 (1974)). This burden is a heavy one. Id. at 992.

Non-Reappointment at FASN

Plaintiff contends that her nonreappointment to the position of assistant professor at the FASN in 1988 was the consequence of defendant's discrimination on the basis of age and sex. Defendant argues that this claim must be dismissed, because plaintiff cannot prove the essential element of her prima facie case that she was qualified for reappointment. Defendant argues that, although the present case is not a

tenure denial case, standards adopted by the Third Circuit for determining the qualification prong in tenure cases should be applied to plaintiff's claim. In Roebuck v. Drexel University, the Third Circuit held that in a tenure case, a plaintiff

> need only show that [she] was sufficiently qualified to be among those persons from whom a selection, to some extent discretionary, would be made. That is, [she] need show only that [her] qualifications were at least sufficient to place [her] in the middle group of tenure candidates as to whom both a decision granting tenure and a decision denying tenure could be justified as a reasonable exercise of discretion by the tenure-decision making body.

852 F.2d 715, 726 (3d Cir. 1988) (citing Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 63 (1st Cir. 1981), cert. denied, 454 U.S. 1098 (1981)). Defendant further cites the more recent

case of Bennun v. Rutgers State University, 941 F.2d 154 (3d Cir. 1991), cert. denied, 112 S. Ct. 956 (1992), as providing a test for determining whether a candidate falls within the middle group of candidates. In Bennun, the Third Circuit concluded that "[t]he divergent votes of the various review groups show the sufficiency of Bennun's scholarly and academic credentials for attainment of the rank of full professor was debatable among the peers who evaluated him." Id. at 176 (citation omitted). Defendant concludes that this opinion represents a holding that at least some disagreement among reviewers is required to show that an applicant for faculty reinstatement falls within the "middle group," thus satisfying the qualification prong of the prima facie case.

The court disagrees, however, with

defendants' reading of Bennun. Nowhere in Bennun does the circuit court state that evidence of some support among faculty recommenders is necessary to establish that a candidate may be qualified for tenure or reappointment. Rather, Bennun presents the "divergent vote" approach as a sufficient, not a necessary means of satisfying the qualification prong. Further, it is evident to the court that evidence of divergent votes cannot be required to establish a prima facie case, if only because this would insulate a uniformly discriminatory hiring process from challenge under Title VII and the ADEA.[3]

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3. Also, although no reviewer recommended Fisher for reappointment, the Associate Dean of FASN-Business and then-chair of the Department of Business Administration and Accounting wrote in August 1987, in support of Fisher's application for a salary increase, that Fisher "is actively engaged in a research

Plaintiff further objects that precedents involving denial of tenure are inapplicable to a situation involving nonreappointment. In a Second Circuit case, Powell v. Syracuse University, 580 F.2d 1150 (2d Cir. 1978), cert. denied, 439 U.S. 984 (1978), the appellate court specifically addressed the showing required to satisfy the qualification prong in a non-reappointment suit:

> The plaintiff need not show perfect performance or even average performance to satisfy this element. He need only show that his performance was of sufficient quality to merit continued employment, thereby raising an inference that some other factor was involved in the decision to discharge him.

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effort. She has two articles published or accepted in refereed journals and has participated in numerous professional meetings as a presenter or discussant. We believe she is a serious prospect for eventually being tenured." Plaintiff's Surreply, Ex. I.

Id. at 1155 (quoting Flowers v. Crouch-Walker Corp., 552 F.2d 1277, 1283 (7th Cir. 1977)).

Plaintiff argues that Powell embodies a different test for the qualification prong from Roebuck, and that only the Powell standard is applicable in a non-reappointment case. The court, however, finds no conflict between the Roebuck and Powell holdings. Roebuck held that to satisfy the qualification prong, a plaintiff need only show that she was in the middle group of candidates about whom a discretionary decision for or against employment would be justifiable. Powell suggests that the objective qualifications required to satisfy this requirement may be less demanding for reappointment than for tenure. However, it is consistent with Powell to find that

a nonreappointed plaintiff has made the required showing by demonstrating that she is at least in the middle group of candidates about whom a discretionary decision might be made.[4]

In the present case, plaintiff has made such a showing by her allegations that she was as qualified or more qualified that others who were granted reappointment. Fisher has submitted evidence showing that her credentials were in many respects at least equal to those of a male candidate considered for and awarded reappointment at the same

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4. To the extent that the Powell holding reflects the view that reappointment decisions involve less discretion than a tenure decision and carry a presumption in favor of reappointment, the court is unwilling to adopt this factual determination as a general rule. In the court's view, it is more appropriate to consider the particular reappointment policy of employers on a case-by-case basis.

time her application for reappointment was considered and rejected.[5] This

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5. The reappointment application forms show that both Castelino and Fisher published one article while at Rutgers, and that Castelino's was co-authored while Fisher's was sole-authored. Hosford Aff., Exs. 23 & 28. Fisher presented three papers at conferences while at Rutgers and two before she was hired by Rutgers. Castelino presented two papers while at Rutgers and one before being hired there. Id. Defendant maintains that plaintiff's comparison is flawed because plaintiff's publication was an outgrowth of her dissertation and was not management-oriented while Castelino's paper, published in a finance journal, was of much higher quality; because Castelino had published much more significant work before coming to Rutgers; because Castelino had three articles on review with referred finance journals and three additional projects in progress, while Fisher had only one article on review with a non-finance journal and her work in progress did not show significant growth beyond her dissertation topic; because Castelino had received competitive research grants; and because his professional involvements were more substantive and related to the field of finance. Def. Reply 10-14. Defendant's objections demonstrate that Castelino was arguably as qualified or more qualified than Fisher in many respects; but it does not rebut plaintiff's showing that her

comparison suffices to show that her "qualifications were at least sufficient to place her in the middle group" of candidates for reappointment, "as to whom both a decision granting [reappointment] and a decision denying [reappointment] could be justified as a reasonable exercise of discretion." Roebuck, 852 F.2d at 726.

Plaintiff's qualification for consideration for reappointment are also supported by the University's reappointment policy, which states that

> The term [of an initial appointment] is limited because the promise may not be fulfilled or because the University may not be in a position to reappoint even a satisfactory assistant professor.

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qualifications were sufficient to place her in the group from whom a discretionary decision for or against reappointment would be reasonable.

University Policies on Academic Appointments and Promotions at 10 (Plaintiff Dep. Ex. 22). David Hosford, the Dean of the FASN, concluded in his reappointment evaluation that plaintiff's "overall record is, at best, satisfactory." Reappointment Application, Form No. 6 at 2 (April 22, 1988) (Hosford Aff., Ex. 23). The wording of the University's policy suggests that a satisfactory record is sufficient to place a candidate in the group about whom a discretionary reappointment decision will be made, even if such a record is not, necessarily, sufficient to insure reappointment in all circumstances. Finally, the court observes that "it plainly is permissible for a jury to conclude that an evaluation at any level, if based on discrimination, influenced the decision making process

and thus allowed discrimination to infect the ultimate decision." Roebuck, 852 F.2d at 727. Accordingly, the court does not attach significant weight in determining plaintiff's qualifications to subsequent decisions which, concurring with the initial evaluation by the departmental committee, recommended against her reappointment. Therefore, the court finds that plaintiff has satisfied the qualification prong of her prima facie case with respect to her claim of discrimination in her nonreappointment at the FASN.

Defendant further contends, however, that even if plaintiff establishes her prima facie case, defendant should still prevail on summary judgment, since plaintiff has raised no material issue of fact concerning the pretextuality of defendant's articulated legitimate,

nondiscriminatory reasons for her nonreappointment. Under Third Circuit precedent, a plaintiff can avoid summary judgment only if she can produce evidence of pretext sufficient to create a triable issue. Fowle v. C & C Cola, 868 F.2d 59, 62 (3d Cir. 1989); Healy v. New York Life Insurance Co., 860 F.2d 1209, 1219 (3d Cir. 1988), cert. denied, 490 U.S. 1098 (1989). Pretext may be established either "directly," by persuading "the court that a discriminatory reason more likely motivated the employer or indirectly," by showing "that the employer's proffered explanation is unworthy of credence." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981). In order to raise an inference of pretext through comparison to other tenure candidates, the evidence must not merely show a "context of

disagreement," but must be sufficient "to support a finding that such disagreements or doubts are influenced by forbidden considerations such as sex or race." Zahorik v. Cornell University, 729 F.2d 85, 94 (2d Cir. 1984). As the Bennun court has held, "glaring" inconsistencies between the treatment of applications by a plaintiff and other applicants may alone be sufficient to raise such an inference of forbidden considerations. 941 F.2d at 179.

Because plaintiff has not identified such "glaring inconsistencies" or other evidence that defendant's doubts about her were influenced by forbidden considerations, the court concludes that Fisher has not provided evidence of pretext to create a triable issue. Although she carried her prima facie case, she has failed to produce any

evidence on the basis of which a reasonable jury could reject defendant's proffered legitimate reasons for not reappointing her. Accordingly, Fisher's sex and age discrimination claims based on her non-reappointment at FASN will be dismissed.

Although plaintiff has identified certain inconsistencies in the treatment of her application for reappointment and of a similarly situated, younger male's application, the court finds that defendant has proffered unrebutted legitimate reasons for all these "inconsistencies" and that they do not, in any event, represent the type of "glaring" inconsistency required under Bennun to raise an inference of discrimination.

First, plaintiff contends that the comments concerning professional activity

in both the Appointments and Promotions Committee Form and the Departmental Discussion and Recommendations were virtually identical for her and Castelino: both were said to have "been appropriately active in professional activities." Castelino and Fisher Reappointment Packets, Forms 4 & 5 (Hosford Aff., Exs. 23 & 28). Further, Dean Hosford rated plaintiff's professional activity as "above average," and commented that "Dr. Fisher has a quite extensive and appropriate record of professional activity. It is certainly somewhat stronger than might be expected." Fisher Reappointment Packet, Form No. 6, at 2 (Hosford Aff., Ex. 23). However, plaintiff's performance in the professional activities category was uniformly rated as being "average" by these review committees, while Castelino

was uniformly rated as "above average." Defendant explains the difference in rating on the grounds that all but two of plaintiff's professional activities involved higher education organizations rather than management organizations, while Castelino had presented three papers at finance organizations, was a reviewer for two finance journals, and had been a senior consultant in a relevant finance-oriented company. The court finds that this distinction expresses a legitimate preference for activities within Castelino's own field of finance--indeed, plaintiff's lack of credentials and accomplishments within her field, management, was a consistent source of criticism throughout the review process.

Second, plaintiff points out that in Castelino's Departmental Recommendations,

his receipt of several grants is listed as a factor contributing to the evaluation of his research accomplishments; while Fisher's recommendation does not mention the several similar grants she received. Id. Defendant, however, has submitted affidavits from the Dean of FASN and the Provost of Rutgers' Newark campus, and the deposition of a Professor on her Departmental committee, stating that Castelino's grants were more significant because they included two grants from the Coordinating Council of Business Studies which were awarded competitively based on faculty peer review of the recipient's research. Gilad Dep 67; Hosford Aff. ¶ 63; Samuels Aff. ¶ 29. Once more, this unrebutted legitimate reason dispels any inference of discrimination that might be drawn from the different treatment

accorded Fisher and Castelino.

Third, the below-average student assessment of the difficulty of her four courses is noted, implicitly as a negative factor, in Fisher's Departmental Recommendation; while Castelino's Departmental Recommendation is silent concerning the same statistic, although in one of the two courses for which he provided student assessments, his rating was identical to Fisher's average rating. Id. In his deposition, the chair of plaintiff's department explained this discrepancy, stating that Fisher's subject matter difficulty evaluation was singled out because there was "mismatch of perceptions," since Fisher thought her students were poorly prepared, while the students found the course easier than others. When asked why this "mismatch" was noted, the chair stated that "we were

puzzled" about the discrepancy. Venezian Dep. 118-19 (Def. Dep. Excerpt P). The "puzzling" mismatch was also noted on Fisher's Departmental Recommendation. Form No. 4 (Hosford Aff. Ex. 23). Once more, these unrebutted explanations eliminate the possibility that any inference of discrimination may be drawn from defendant's behavior toward Castelino.

In addition to these principal points, Fisher also points to certain minor procedural irregularities in the treatment of her reappointment decision. Fisher contends that Emilio Venezian, her department chair, failed to notify or convene all of the tenured faculty to participate in the decision and, contrary to a University prohibition, voted with the department rather than submitting a separate, independent evaluation; that

Venezian asked Fisher for proof of certain statements in her reappointment application and further information that he did not request from other candidates; and that Rutgers considered her for reappointment in the third, rather than the second year of her employment, in violation of the terms of her contract.

The court finds that these objections, even if unrebutted, would provide at most extremely weak evidence of discriminatory intent, in the absence of further evidence that any of these procedural irregularities had or was likely to have an adverse impact on plaintiff's prospect for reappointment. Further, defendant has proffered legitimate reasons for each of these procedural "irregularities," to which plaintiff has offered no plausible rebuttal.

Defendant has submitted sworn statements that, as of Spring 1988, University policy provided that the department chair was supposed to participate and vote with the departmental committee rather than completing a separate chair's statement where the total number of faculty eligible and present to sit on the committee, including the chair, was three. Ambrose Aff. 8-15; Hosford Aff. 69-70. Further, the same procedure, with Venezian voting with the committee, appears to have been followed in the review of Castelino's application for reappointment.[6] The absence of Professor

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6. Plaintiff contends that the new regulation providing for the chair to participate in the departmental rating "in a department of three tenured faculty members," even if it applied to plaintiff's application, did not justify the inclusion of Venezian. Plaintiff Surreply at 2 & Ex. B. Plaintiff argues

Blake from the departmental committee is adequately explained by the fact that he had been ill, as plaintiff acknowledges. Plaintiff Surreply at 3 & Ex. F. As for the timing of her reappointment decision, defendant has given the unrebutted explanation that every other FASN assistant professor evaluated for

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that the regulation applies to departments with no more than three members, not where no more than three members are available, as defendant contends. The court, however, finds that defendant's interpretation of the regulation is both credible and plausible, particularly in view of the fact that the regulations do not provide for deferring decisions on reappointment candidates where tenured department members are unavailable to participate. Even if plaintiff's interpretation of the regulation is equally plausible, there is nothing in defendant's choice of a reading importing the requirement of "availability" to raise an inference of discriminatory animus, and plaintiff does not claim that defendant applied its "available faculty" criterion inconsistently, singling her out for different treatment then any other reappointment candidate.

reappointment in the spring of 1988, including Castelino, was reviewed in their third year of employment. Finally, defendant has explained that Venezian requested verification that a particular journal in which Fisher published was refereed, while making no such inquiry of Castelino, because Venezian was familiar with the journals in which Castelino published but did not recognize Fisher's journal. Venezian Dep. 102-104. This reason is unrebutted in fact, because the journal in which Fisher published was a higher education journal, Venezian's ignorance of it supports defendant's claim that Fisher's academic credentials were limited to fields other than those for which she had been hired.

In addition to Castelino, plaintiff has sought to compare herself with four other FASN assistant professors in other

departments who were reappointed in 1988. All were younger men. Because these faculty were evaluated by different departmental committees, the usefulness of the comparison in establishing discrimination against plaintiff is limited. But, in any event, defendant has once more proffered unrebutted legitimate reasons for its employment decisions with regard to these faculty members, which explain the apparent disparate treatment that plaintiff identifies.

Thus, Professor Ferguson received unanimous-outstanding ratings at all levels. Plaintiff's objection that Ferguson had no refereed articles published at the time of his evaluation is irrelevant, because, as Rutgers Provost Norman Samuels and FASN Dean David Hosford have explained in sworn

affidavits, defendant's decision regarding Ferguson was based on the fact that he had edited and written portions of books, had a substantial number of articles well-advanced in the publication process, and had received outstanding ratings for teacher effectiveness. Hosford Supp. Aff. 2-7; Samuels Supp. Aff. 2-11. Similarly, although Professor Fowles had fewer published articles at the time of his reappointment decision, he had three articles under revision with "top journals," had produced computer software distributed on a nationwide basis, was rated above average for teaching effectiveness, and was judged to be valuable to other faculty members as an applied econometrician. Samuels Supp. Aff. 14, 16-17 & 22; Hosford Supp. Aff. 10-13 & 16. Plaintiff notes correctly that Professor Einhorn received a

below-average rating for teaching effectiveness from one departmental evaluator; however, he also received two average and one above average rating in this same category and additionally had a long list of publications and work in progress. Hosford Supp. Aff. 26-30; Samuels Supp. Aff. 23-27. Finally although Professor Timberg received low ratings for teacher effectiveness, he had a fairly extensive record for research accomplishments and was "head and shoulders" above any other member of his department, which defendants recognize as one of the weakest at FASN. Hosford Supp. Aff. 18-20, 23-24; Samuels Supp. Aff. 30-34.

Based on the unrebutted evidence submitted to the court, it appears that all of these candidates were, at least within the context of their departments,

stronger candidates for reappointment than Fisher. None of these candidates was reappointed despite a unanimous negative assessment by his departmental committee, like Fisher received. Defendant has submitted legitimate reasons for all the apparent disparities that plaintiff identifies. At most, the evidence submitted by Fisher suggests that there might have been some grounds for disagreement about whether the four male professors were qualified for reappointment. However, as with Castelino, Fisher has entirely failed to point to any "glaring" inconsistency of the type required to raise an inference of pretext in the face of legitimate reasons such as those proffered by defendants for denying Fisher's application for reappointment. Bennun, 941 F.2d at 179.

Plaintiff has also submitted statistical evidence which, she claims, supports her allegations of discrimination. It has been recognized that a viable "method of establishing the nexus between age discrimination and adverse employment action is by statistical proof of a pattern of discrimination." Pace v. Southern Railway System, 701 F.2d 1383 (11th Cir. 1983), cert. denied, 464 U.S. 1018 (1983). Thus, "statistical proof or other 'evidence of a pattern of terminating older workers . . . allow[s] the reasonable inference that age had played a role in appellant's discharge." Pace, 701 at 1388 (quoting McCorstin v. United States Steel Corp., 621 F.2d 749, 754 (5th Cir. 1980)). The Third Circuit has also stated that "the inference of unlawful discrimination may be raised,

and thus '[a] prima facie case of disparate treatment may be established by statistics alone if they are sufficiently compelling.'" Green v. USX Corp., 843 F.2d 1511, 1527 (3d Cir. 1988), vacated on other grounds, 490 U.S. 1103 (1989) (quoting Griffin v. Carlin, 755 F.2d 1516, 1525 (11th Cir. 1985)).

In 1987 and 1988, the year of and the year following her application for reappointment, a total of 16 professors, 12 male and 4 female, sought reappointment at FASN; all but 2 were reappointed.[7] All 12 men were reappointed. Two of four women were denied reappointment. Of this same pool of 16 professors, 13 were under 40 and 3

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7. These statistics exclude two men, one of whom was over 40, who were reappointed at FASN in 1987, but were originally appointed at a different institution in a different job unit.

were over 40. All professors under 40 were reappointed and 2 out of the 3 professors over 40 were not reappointed. Thus both the professors denied reappointment at FASN in this two-year period were women over forty.[8] Plaintiff's 12(G) Statement, ¶¶ 67-68; Fisher Aff. 10-11.

Plaintiff has submitted the affidavit of a Princeton University economics professor who has reviewed this data to determine whether there is statistical evidence of discrimination on the basis of age and sex at FASN and the GSM. The expert stated that:

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8. The court finds it inappropriate to draw any inference about discriminatory animus at the FASN from the alleged actions of the GSM in response to plaintiff's applications for transfer. Therefore, plaintiff's statistics concerning employment decisions by the GSM will not be considered in determining the pretextuality of FASN's reasons for denying her reappointment.

> I conclude that the average age of those not reappointed was higher than the average age of those who were reappointed and that this difference is unlikely to have arise by chance. I also found that older faculty were less likely to be reappointed than younger, faculty, and that this difference was statistically significant for GSM and FASN faculty together according to the Chi-Square test, but not Fisher's Exact Test. The difference among FASN faculty was not statistically significant according to either test. Women were also less likely to be reappointed than men. The difference between the reappointment rates of women and men is generally statistically significant.

Ashenfeltter Aff. ¶ 17.

Such evidence is clearly not irrelevant to Fisher's claims, and supports her prima facie case. However, the case is now in a different posture: the prima facie case has been made and defendant has come forward with legitimate reasons for its actions. The

question now before the court is whether there is any material fact in dispute that might support a finding that these proffered reasons were pretextual. As stated above, the comparisons Fisher seeks to draw to other reappointment candidates do not raise a triable issue regarding the presence of discriminatory intent. The question therefore presents itself whether plaintiff's statistical evidence, standing alone, can raise such a triable issue regarding pretext. The court finds that it cannot.

Plaintiff's expert concludes that there is no statistical significant pattern of age disparity in reappointment decisions and that the evidence of sex disparity was, at best equivocal, since, while one test suggested the pattern was statistically significant, another did not. The probative value of these

statistics is further weakened by the small sample size involved. See Pace, 701 F.2d at 1389. However, the court finds of chief significance the fact that plaintiff's non-reappointment statistics include her own case, with regards to which, as described above, there is no basis for assuming discriminatory animus apart from these statistics themselves. Apart from her own case, plaintiff thus can point to only one other instance of non-reappointment as the basis for the alleged pattern of discriminatory conduct by defendants.

The court concludes that this evidence is simply insufficient to allow a reasonable jury to conclude that defendant's proffered reasons for denying Fisher reappointment were pretextual. No particularized evidence has been submitted regarding the other candidate

denied reappointment beside Fisher. Fisher asks the court only to consider the statistical pattern as evidence of discriminatory animus. But the court finds it outside the scope of reasonable inference to conclude from reliance on a single datum point that defendant's conduct displays a pattern of discrimination, in view of the absence of any evidence of discrimination apart from that alleged pattern in Fisher's own case and of the unrebutted legitimate reasons proffered by defendant for its decisions regarding Fisher.

In these circumstances, plaintiff's statistical evidence does not raise a material issue of fact concerning the credibility or legitimacy of defendant's reasons for its actions. Accordingly, since neither plaintiff's comparative nor statistical evidence raises an inference

of pretext, plaintiff's discrimination claims with regard to her nonreappointment will be dismissed.

Refusal to Hire at the GSM: 1984 Applications

Defendant claims that plaintiff has failed to establish a prima facie case that defendant discriminated unlawfully in refusing to hire her for a position at the GSM in February and September 1984. Defendant does not dispute that plaintiff makes out the first element of her McDonnell Douglas prima facie case. Nor does defendant dispute that the candidates it hired were from outside the protected classes. Defendant's claims focus on its contention that plaintiff did not satisfy the second prong of the McDonnell Douglas test. In particular, defendant contends both that there was no

position available in February 1984 and that plaintiff was not qualified for the positions for which she applied in February and September 1984.

Defendant maintains that in both February and September 1984, the Organization Management Area in the GSM was seeking personnel specializing in Business Policy and Strategy or Technology Management and Innovation, and that plaintiff's lack of qualifications in those fields rendered her unqualified for the positions she sought. Defendant has submitted an affidavit from George Farris, the chair of the Organization Management Area of the GSM at the time plaintiff was applying for a position there. Farris states that when plaintiff applied, the GSM was seeking faculty for the areas of Business Policy and Technology Management and that plaintiff

had no meaningful background or experience in either area. Farris Aff. at ¶¶ 6 & 8. Plaintiff has also submitted the deposition testimony of David Blake, the GSM Dean during the period of plaintiff's applications to GSM. Blake states in his deposition that, during this time, GSM was attempting to strengthen its research and teaching capabilities, especially in the area of business policy, and that two faculty were hired who strengthened the business policy area, and one who partially strengthened this area and also had expertise in management technology. Blake Aff. 69-70 & 72-73.

The court needs not dwell on whether plaintiff has succeed in establishing her prima facie case, however. For, assuming that the prima facie case has been made out plaintiff fails to raise a triable

issue as to the pretextuality of defendant's proffered reasons for failing to hire her at the GSM in 1984. Defendant has submitted sworn statements that in both February and September 1984, it was seeking personnel for GSM specializing in fields in which plaintiff had few if any credentials and no experience. Plaintiff argues that GSM did not explicitly advertise specifically for these fields and that the personnel eventually hired by GSM have taught outside these areas, in subjects that fall within Fisher's specialty. Further Fisher argues that she was closer to receiving her Ph.D. than either of the candidates hired in February 1984 and more qualified than the candidate hired

in September 1984.[9]

However, none of these contentions raises a reasonable inference that defendant's explanation that it was simply looking for someone with a different area of specialization was pretextual. The advertisements to which plaintiff refers solicited faculty for both the GSM and "the undergraduate programs of Rutgers," and listed both "Business Policy" and "Organization Management" as fields in which faculty were sought. Ferris Aff., Exs. 2 & 4. This general advertisement is consistent

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9. Plaintiff also alleges that of the sixteen faculty members hired in the organization management area at GSM since the 1983-1984 academic year, all were male, only one was over forty, and he was denied reappointment. However, plaintiff has produced no statistical evidence that this pattern raises an inference of discrimination, apparently because plaintiff lacks information about the relevant applicant pool. Plaintiff Mem. 20.

with defendant's claim that GSM sought only faculty in the business policy area. Assuming that plaintiff is correct that the individuals hired to the GSM positions taught courses at some point in the Organization Behavior area, that fact does not cast doubt on defendant's statement that it sought personnel specializing in business policy or technology management. Plaintiff does not claim that the professors hired by GSM did not teach in these fields, nor that they taught even extensively in the Organization Behavior area. Occasional teaching in a distinct area does not raise a reasonable inference that defendant's claim that these professors were hired because of other specialties lacks credibility.

As for her claims that she was more qualified then the men hired to the 1984

positions, Fisher admits that she had not yet received her Ph.D. at the time she applied to the GSM for the February 1984 position. However, even if she were clearly more advanced towards her Ph.D. than were the two males hired at that time, that factor, standing alone, does not render reasonably incredible defendant's contention that it preferred the two males over her because they specialized in the field for which GSM was then seeking to strengthen its faculty, particularly in view of the fact that the advertisements, to which Fisher refers, stated that "ABD's in final dissertation stage will be considered." Ferris Aff., Exs. 2 & 4. Finally, the then-chair of the Organization Management Area in GSM has averred that the male hired in September 1984 had obtained his Ph.D. in 1983 and "presented considerable

qualifications regarding the introduction and innovation of major new technological systems in organizations, a significant aspect of Technology Management." Farris Aff. ¶ 14. Once more, in light of these unrebutted assertions, plaintiff has failed to carry her burden of submitting any evidence from which a trier of fact could reasonably infer that defendant's legitimate reasons for refusing to accept her application to transfer to GSM were pretexts for discrimination.

Refusal to Hire at the GSM:
Post-Nonreappointment Application

Following receipt of her notice of nonreappointment, plaintiff met with Provost Samuels in June 1988, at which time plaintiff asked that the Provost consider transferring her to GSM. Plaintiff was not transferred, and has

alleged that this employment action is part of defendant's pattern of discrimination on the basis of age and sex.

Defendant contends that plaintiff has failed to establish a prima facie case with respect to this claim since plaintiff requested that she be hired for the 1988-89 academic year and that, at the time she made this request, there were no openings since faculty recruiting for that year had been completed as of June 1988. However, plaintiff responds that this argument is premised on a factual error concerning her request of Provost Samuels. Plaintiff contends that she was actually seeking an Organization Management Area position for the 1989-90 academic year and not for the 1988-89

academic year.[10] Plaintiff states that at the same time she made her request for a 1989-90 position, she sought unpaid leave for the 1988-89 academic year so she could accompany her husband to a university in another part of the country, where he had accepted a position as a visiting professor. Defendant does not claim that there were no openings in the Organization Management Area for the 1989-90 academic year. Indeed, plaintiff contends that, at the time she made her

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10. Defendant argues that because plaintiff's complaint is "devoid" of allegations concerning an attempted transfer to GSM in 1989-90, she should not be permitted to raise such claims at this time. Def. Reply 33. Plaintiff's complaint alleges that "[i]n June, 1988, and in subsequent months plaintiff again requested . . . that she be transferred to GSM." Complaint ¶ 6. The court finds that this allegation, although lacking somewhat in precision, adequately states a claim based on plaintiff's alleged application in the months after June 1988, for transfer to GSM for the academic year 1989-90.

request, it was her understanding that such positions remained unfilled. According to plaintiff, she was correct in this understanding because a male under forty was ultimately hired for a 1989-90 position in the Organization Management Area at GSM in September 1989, well after plaintiff had applied.

However, assuming that plaintiff in fact sought to transfer in the 1989-90 academic year, and that such positions remained unfilled at the tine she approached Provost Samuels, the court finds that Fisher has failed to establish her prima facie case for this claim for a different reason: she has produced no evidence to suggest that she submitted a resume or other form of application to the Organization Management area at the GSM, and the then-chair of the Organization Management area has sworn

that he received no resume or letter of application from plaintiff after November 1984.[11] Farris Aff. ¶ 15. The second prong of the McDonnell Douglas test requires that a plaintiff show that she applied, and was qualified, for a job for which the employer was seeking applicants. 411 U.S. 792 (1973). Apart from her claim to have spoken to Provost Samuels, plaintiff has neither produced evidence nor alleged facts sufficient to establish that she applied for a position at the GSM for 1989-90. Further, plaintiff has produced no evidence supporting her claim to have been qualified for transfer to the GSM at that

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11. In her deposition, plaintiff stated that she did not submit an application for employment to the Graduate School of Management or a curriculum vitae for consideration by the Organizational Management area at GSM after her appointment at FASN in 1985. Fisher Dep. 121-122 (3/4/91) (Def. Dep. Ex. 1).

time. The court therefore concludes that plaintiff has failed to establish her prima facie case with respect to her allegations of discrimination in GSM's refusal to accept her transfer for the 1988-89 or 1989-90 academic years.

Setting of Plaintiff's Salary

In addition to her claims of nonreappointment and non-hiring, plaintiff alleges that defendant violated the Equal Pay Act, 29 U.S.C. § 206(d), which forbids discrimination in wages on the basis of sex.[12] Defendant argues

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12. Under the EPA, the structure of proofs varies from the familiar Title VII analysis. Once plaintiff establishes a prima facie case, by showing that plaintiff's job was substantially identical to a male's job but that she was paid less--defendant must show by a preponderance of the evidence that the differential in pay was based on merit, seniority, or some factor other than sex. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974); Brewster v. Barnes,

that, assuming that plaintiff can establish a prima facie case of age and sex discrimination regarding her salary level during 1985 and 1986, it should still prevail on its motion for summary judgment since it has come forward with evidence of legitimate, nondiscriminatory reasons for the relatively low setting of plaintiff's salary, and plaintiff has not raised a material issue of fact supporting her claim that these proffered reasons were pretextual.

Defendant claims that, before the time plaintiff's initial salary was set, Dean Hosford had determined a proposed salary range of $30,000 to $35,000 for a faculty position in the field of Organization Management. Defendant claims this salary range was based upon

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788 F.2d 985, 992 (4th Cir. 1986).

then-current market conditions. Defendant further claims that Hosford placed plaintiff on the bottom end of this range because he had reservations about the appropriateness of plaintiff's credentials for an Organization Management position. Specifically, defendant cites as causes of Hosford's concern that plaintiff lacked a business school doctorate, that her dissertation was not in a business discipline, that she had very limited experience teaching courses in organization management, and that she had no meaningful research program in the management field.

In a letter dated April 25, 1985, Fisher wrote to Dean Hosford, inquiring as to the range and step of her salary. Hosford replied by letter on July 8, 1985 that the salary quoted in her letter of offer, $30,033.00, was "a dollar amount

that did not indicate precise range and step. That figure will be placed, as appropriate, on the new salary scale effective July 1, 1985." Hosford Aff., Ex. 12. Plaintiff points to a document which, she claims, belies Hosford's assertion that plaintiff's salary was set at no particular range or step. Dean Hosford had signed a Search Authorization Procedure and Hiring Authorization Procedure Form ("SAP/HAP") on April 1, 1985 which indicated that plaintiff's salary range was 25, the step was 18 and that plaintiff's salary would be $30,033.00. Hosford Aff., Ex. 4, at 2.

Plaintiff contends that the discrepancy between Hosford's July 8 letter and the SAP/HAP Form casts doubt upon defendant's good faith in setting plaintiff's salary. Although Hosford's alleged misrepresentation does not

provide direct evidence of discriminatory intent, it does, according to plaintiff, provide indirect evidence of pretext, by suggesting "that the employer's proffered explanation is unworthy of credence." Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 256 (1981).

The court, once more, disagrees. In response to plaintiff's prima facie case, defendant has proffered numerous legitimate, market-based reasons for setting plaintiff's salary at the bottom of the range established by Dean Hosford. Plaintiff's sole evidence that these reasons were pretextual is Hosford's alleged misstatement that no range and step had been assigned to Fisher as of July 8, 1985. The court doubts that a misstatement about plaintiff's range and step, even if intentional, could be reasonably viewed as evidence of salary

discrimination, since plaintiff was obviously aware of her salary and would not have been prevented by such a misstatement from comparing the amount she was paid to the salary received by similarly situated male employees. It would be unreasonable for a jury to conclude that Hosford's statement provides any evidence that defendant's proffered reasons for her salary level are unworthy of credence, since placement on a range and step has no bearing on the reasons for the level of her pay. It is no more inconsistent with defendant's proffered reasons for plaintiff's salary to learn that plaintiff was assigned to a given range and step than to learn she was assigned to no range and step at all.

Moreover, the court finds that plaintiff's argument fails for a further reason. As plaintiff herself admits,

Hosford stated, in the same letter in which he represented that no range or step had yet been assigned to her, that her salary "figure will be placed, as appropriate, on the new salary scale effective July 1, 1985." Given this representation, no reasonable juror could conclude that Hosford was attempting to conceal evidence of discrimination from plaintiff: in fact, his statement implies that Fisher had already been assigned to a range and step by the date the letter was dispatched on July 8, 1985. Such a statement is inconsistent with an intent to deceive, since it would invite a job candidate interested in her range and step to inquire immediately as to what action had been taken on July 1, 1985. That plaintiff appears never to have made such an inquiry further supports the common-sense conclusion that it was the

amount of her paycheck, and not her place on the salary scale, that was of interest to her. Accordingly, the court concludes that plaintiff has failed to raise a material issue of fact that defendant's proffered reasons for her salary assignment were a pretext for discrimination.

For the foregoing reasons, plaintiff's claims of discrimination on the basis of age and sex will be dismissed in their entirety. Because consideration of the merits of her claims is dispositive, the court will not review defendant's further arguments that plaintiff's claims are barred by the statute of limitations.

Exhaustion of Contractual Grievance Procedure

In Count VII of her complaint, Fisher alleges that in processing her reappointment, defendant violated numerous University regulations and provisions of the Faculty Contract between the University and the Rutgers Council of AAUP Chapters. Based on these allegations, Fisher brings a claim for breach of contract against defendant. Complaint ¶¶ 21-22.

It is undisputed that these claims are subject to a requirement, set forth in Article X of the Faculty Contract, that a plaintiff must first exhaust the contractual grievance procedure before raising her claims in court. Def. 12(G) at ¶ 184; Ambrose Aff. ¶ 17 & Ex. 7. See Garrow v. Elizabeth General Hospital & Dispensary, 79 N.J. 549, 558 (1979)

("[e]xhaustion of administrative remedies before resort to the courts is a firmly embedded judicial principle"). However, plaintiff claims that she is exempted from pursing her claims to exhaustion by virtue of the futility exception to the exhaustion requirement.

Fisher's claim is based on her allegation that defendant's alleged repeated delays in considering her grievance was a legitimate basis on which to invoke the futility exception. In Angel v. Pan American World Airways, Inc., 519 F. Supp. 1173, 1177 (1981), overruled on other grounds by Paralyzed Veterans of America v. Civil Aeronautics Board, 752 F.2d 694, 714 (D.C. Cir.), rev'd, 417 U.S. 597 (1986), a district court found that, where an administrative complaint had been pending for thirteen years, the case fell within the futility

exception to the exhaustion requirement. See also Smith v. Illinois Bell Telephone Co., 270 U.S. 587, 591 (1926) (finding that administrative remedies need not be exhausted where the agency "for a period of two years, remained practically dormant; and nothing in the circumstances suggest[ed] that it had any intention of going further with the matter"). However, a circuit court has recently stated that "administrative delay could meet the futility exception only where it appears that agency inaction is in reality a statement by the agency of its unwillingness to consider the issue." Randolph-Shepherd Vendors of America v. Weinberger, 795 F.2d 90, 106 (D.C. Cir. 1986). Further, a plaintiff is not "free to by-pass" administrative remedies "based upon [the] unfounded belief that resort to such remedies would be futile."

Fregara v. Jet Aviation Business Jets, 764 F. Supp. 940, 952 (D.N.J. 1991).

Fisher alleges that she first filed an intent to grieve letter on July 15, 1988. She received an extension and submitted her Article X filing form on September 15, 1988. Rutgers returned the grievance on September 23, 1988, requiring "appropriate revisions."[13] Fisher filed the revised grievance, retaining seven claims disallowed by defendant, on October 21, 1988.[14] Rutgers again returned the grievance for revisions on November 8, 1988, on the

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13. Rutgers stated that twelve out of nineteen of plaintiff's claims were not cognizable under the Article X grievance procedure and that plaintiff had not submitted her grievance on the mandatory filing form. Ambrose Aff. ¶ 25.

14. According to defendant, the AAUP Grievance Administrator had requested an extension of the ten day deadline on plaintiff's behalf. Id. at ¶ 26.

basis that two claims should continue to be disallowed and that plaintiff had not used the proper grievance form. Id. at ¶ 28. Fisher appealed this rejection and her appeal was denied on January 23, 1989. On February 6, 1989, she filed a second revised grievance, which Rutgers accepted on February 15, 1989.

Fisher filed an expanded grievance statement on March 28, 1989; defendant asserts that this filing date was once more based on an extension of time beyond the filing period mandated by Article X. Id. at ¶ 31. On May 2, 1989, Rutgers' response was filed. Article X requires that this response be filed "within 25 working days" of receipt of the expanded grievance statement. Ambrose Aff., Ex. 7 at 24. Plaintiff claims that defendant missed this deadline; however, counting only weekdays, defendant's submission was

timely. The grievance committee is required by Article X to meet to hear the grievance within ten working days of receipt of the University's response. However, the first hearing date was set for June 2, 1989. At this hearing, Rutgers allegedly requested that a "key witness" be allowed to testify out of turn to accommodate his travel plans. Fisher refused. As a result of this dispute, the hearing was rescheduled for June 19 and 20, 1989. Fisher's counsel later sought and received a postponement of these dates.

Thereafter, no hearings were convened through the summer months, allegedly because of Rutgers' scheduling problems in convening the grievance committee during the summer. Further,. one committee member was unavailable in the first part of the fall 1989 semester

because of a vacation, and Rutgers did not offer to substitute another grievance committee member. Allegedly, Rutgers was unable to agree to any date proposed by plaintiff until the third week in October, except for a sole day in September. The parties agreed that an isolated hearing date was pointless. Rutgers proposed meeting in November; Fisher insisted on beginning the process in October. Rutgers then proposed half-day hearings on October 24, 25 and 26 with four full days set aside in the middle of November. Fisher's attorney responded,

> We do not believe that three half-day sessions will be enough to complete the hearing. Therefore, we must insist on the following schedule: October 24 (afternoon), October 25 (all day), and October 26 (all day). As a back up, in case we do not conclude, we propose October 30th. It is essential that, within reasonable scheduling,

> all witnesses, including administration, be available. Unless this schedule is acceptable, we will be forced to conclude that our efforts to exhaust the grievance process are futile and we will proceed to other remedies.

Letter of Stephen J. Edelstein to Professor Rohr, Oct. 10, 1989 (Plaintiff Dep. Exh. 2).

In a letter dated October 24, 1989, the day the hearing was to have commenced, Fisher's attorney sent a letter to Rohr, confirming a telephone conversation on October 20, in which the attorney had informed Rohr that plaintiff was "holding to [her] position as expressed" in the October 10th letter and that, as that letter stated, "we will take such further steps as we believe to be consistent with our client's legal rights." Plaintiff Dep. Ex. 3. A letter

from Rutgers' Assistant Vice President for Faculty Affairs to Professor Rohr, copied to plaintiff's attorney, and dated November 17, 1989, stated that:

> [t]he University's position is that this history does not demonstrate the futility of the contractual grievance process. On the contrary, the grievant has demonstrated on several occasions that she is unwilling to pursue this Article X grievance. Accordingly, the University deems this Article X grievance to have been withdrawn.

Plaintiff Dep. Ex. 4.

Article X provides that:

> The number of additional hearings . . . shall be consonant with the provision of an expeditious hearing. . . . all parties to the grievance procedure . . . are charged with the responsibility for cooperating in the scheduling and hearing of the grievance in an expeditious manner, so that the grievance committee is enabled to complete hearing of the grievance within 25 working days of the initial hearing.

Ambrose Aff., Ex. 7 at 24. The lengthy period over which plaintiff's grievance hearings were scheduled clearly does not comply with this provision; although defendants contend that such non-compliance was the norm in grievance procedures.[15] In any event, the court concludes that breach of the terms of Article X is not sufficient to entitle plaintiff to conclude that resort to the grievance procedure was "futile."

To the contrary, the court finds that plaintiff has not raised a material issue of fact concerning the futility of resorting to the grievance procedure.

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15. Rutgers' Assistant Vice-President for Faculty Affairs stated in his affidavit that "it is not unusual that grievances not completed before the end of the spring semester are carried to the fall semester," and that "five grievances filed in 1987 and 1988 regarding denials of tenure were still pending as of September 1989." Ambrose Aff. at 19, 21.

The period from the initial filing of the intent to grieve letter on July 15, 1988, through the filing of the second revised grievance, on February 15, 1989, was occupied by a dispute over the scope of the grievance; the legitimacy of this dispute is indicated by the fact that plaintiff dropped several claims in response to each denial by Rutgers. Plaintiff then received an extension to file her expanded grievance statement on March 28, 1989. Rutgers' response was timely filed on May 2, 1989. Thereafter, the grievance committee did not keep to the timetable prescribed by Article X; although these delays were caused in part by plaintiff's request for adjournments. However, assuming that all subsequent delays were attributable to Rutgers, the total elapsed time, from the filing of defendant's response in May, through the

dates in mid-November when Rutgers offered to schedule four full hearing days, was less than eight months. This period is considerably less than the delay that has sufficed to establish futility in any case called to the attention of the court. See, e.g., Angel, 519 F. Supp. at 1177 (13 years); Smith, 270 U.S. at 591 (two years).

Further, based on Fisher's own submissions, it appears that she contributed to this delay, by requesting extensions prior to May 1989, seeking to postpone two hearing days set for June, requesting only certain hearing dates in September and October, agreeing not to meet on the single day proffered in September, and refusing to meet on the half-days in October or to wait until November. Plaintiff Dep. Ex. 2.

Most important, plaintiff has failed

to raise any material fact or point to any evidence raising an inference that Rutgers' "inaction is in reality a statement by [the University] of its unwillingness to consider the issue." Randolph-Shepherd, 795 F.2d at 106. The facts alleged by plaintiff may show that Rutgers was unwilling to proceed as quickly as Fisher wanted and, indeed, as quickly as it was contractually required to do. However, plaintiff's claims do not support a contention that defendants were dragging out the proceedings in the hope of never having to consider them at all. To the contrary, defendant has submitted unrebutted evidence indicating that it was prepared to commence the hearing on October 24, 1989, and continue it in the following month if necessary. In the absence of any evidence supporting plaintiff's contention that defendant

never intended to review her grievance, the court finds that plaintiff has failed to raise a material issue concerning the futility of resort to the administrative process. Accordingly, the court will grant defendant's motion to dismiss plaintiff's claims in Count VII for failure to exhaust the administrative remedies afforded by the Article X grievance procedure.

In Count VIII of her complaint, plaintiff alleged that the conduct underlying her other claims constituted a breach of "the implied covenant of good faith and fair dealing in the contractual and employment relationship between plaintiff and defendant." Complaint ¶ 25. As her moving papers state, Fisher alleges that "Rutgers breached the implied covenant by violating numerous provisions of the collective bargaining

agreement and its regulations."

Plaintiff Opp. at 45. However, the collective bargaining agreement states that all such claims are subject to the grievance procedure defined in Article X:

> A grievance under Article X is an allegation that, in an evaluation which resulted in failure to award reappointment, promotion and/or tenure, there occurred a material procedural violation of 1) the Academic Reappointment/Promotion Instructions . . . and/or 2) this Agreement, and/or 3) a University Regulation or an established practice of the University related to reappointment or promotion. . . . A violation within the meaning of this Article also takes place when the action taken pursuant to 1), 2), or 3) above is arbitrary or capricious, based on personal prejudice against the grievant and/or based on discrimination . . .

Ambrose Aff., Ex. 7 at 22.

To the extent that such claims may be brought as a grievance under Article X, they are subject to the exhaustion

requirement discussed above. The court does not find any basis in law or logic for permitting plaintiff to circumvent the exhaustion requirement by redefining the identical claims as breaches of the implied warranty of good faith. Accordingly, the court will dismiss plaintiff's claims in Count VIII on the same basis that Count VII was dismissed, for failure to exhaust administrative remedies in the absence of any colorable showing of the futility of attempting to do so.

Due Process

In her Ninth Count, plaintiff claims that defendant's conduct violated her right to due process pursuant to the Fifth and Fourteenth Amendments of the United States Constitution. In the context of faculty employment at public

institutions of higher education, "[t]he requirements of procedural due process apply only to the deprivation of interests encompassed by the Fourteenth Amendment's protection of liberty and property." Board of Regents v. Roth, 408 U.S. 554 (1972). Plaintiff asserts a property interest as the basis for her due process claim. Under Roth, a protected property interest only exists if there is a "legitimate claim of entitlement," and not merely a unilateral expectation. Roth, 408 U.S. at 577.

No case brought to the attention of this court applies Roth in the context of a reappointment decision. However, several courts have regarded Roth as entailing that no property interest exists in a tenure promotion, where the university-employer retained discretion in making tenure appointments and where

no state statute, university rule or policy secured an interest or created a claim to continued employment. Thus, in Beitzell v. Jeffrey, 643 F.2d 870, 875-76 (1st Cir. 1981), the appellate court held that the tenure criteria at issue, of teaching, scholarship, and service, merely reiterated traditional standards for academic promotion and gave rise to neither "objective standards creating an automatic right to tenure" nor a reasonable expectation of a tenure grant. The Beitzell court observed that the educational function of a university requires a wide range of discretion in making tenure awards and calls for the exercise of subjective judgment concerning the qualifications of the candidate and the needs of the university community.

Similarly in Goodisman v. Lytle, 724

F.2d 818, 820-1 (9th Cir. 1984), the court found that the specification of substantive criteria to be employed in the tenure decision process, such as ability in teaching or research, respect from colleagues and service to the University, did not so constrain the University's discretion as to create a constitutionally-protected interest. Within the Third Circuit, a district court rejected the challenge of former Rutgers professors to their denial of tenure on the same grounds. Varma v. Bloustein, 721 F. Supp. 66 (D.N.J. 1988), aff'd, 860 F.2d 1075, cert. denied, 489 U.S. 1014 (1989). In Varma, the court found that Rutgers' promotion guidelines merely "set forth general standards of excellence in teaching, scholarship and research, professional activity, and usefulness to the University that would

be common to any tenure evaluation process at a major academic institution." Id. at 70. Another statement issued by the University of academic promotions stated that "advancement to a higher rank is not automatic," that promotion requires the exercise of subjective judgment, and that the educational needs of the University are a factor considered in awarding tenure. Based on this evidence of the basis for the tenure review process, Varma concluded that the Rutgers professors had no protected property interest in receiving an award of tenure.

The University regulations and policies to which plaintiff refers as the basis for her claimed property interest in reappointment are, in large part, precisely the same regulations and policies found in Varma to establish no

such property interest. Paragraph 3.30 of the University statutes states that:

> Promotions to higher ranks may be made in recognition of teaching effectiveness, scholarly or creative activity, research accomplishments, professional activity, and general usefulness to the University. The weight to be given to each of the factors will be determined in the light of the duties required and to be required of the appointee.

University Policies on Academic Appointments and Promotions (Hosford Aff., Ex. 14, at 3). This court agrees with Varma that "the guidelines set forth in Regulation 3.30 . . . [do] not provide the significant substantive restrictions on University discretion in tenure appointments required to create a protected property interest." 721 F. Supp. at 70. The criteria described in Regulation 3.30 allow wide range for discretion in their application, and the

University Promotion Policy states that "subjective judgment" will play a role in promotion decisions.

The University Promotion Policy recognizes a difference between tenure and reappointment decisions: "[t]here is probably something rather different in kind as well as in quality to be sought in an associate [tenured) professor as distinct from an assistant [reappointed] professor." Policy at 9. However, the court does not find that this difference alters the analysis, nor that there is anything in defendant's policy or regulations suggesting that the reappointment decision is either automatic or narrowly constrained by objective criteria. To the contrary, Regulation 3.30 and the decision-making process described in the University Promotion Policy manual apply to tenure

and reappointment decisions without distinction. Further, the policy manual states, with regard to reappointment, that:

> The [initial] term is limited because the promise may not be fulfilled or because the University may not be in a position to reappoint even a satisfactory assistant professor. It is ordinarily the policy of the University not to appoint an assistant professor for a second term unless there is reasonable expectation that at the end of that time there will be opportunity for further promotion . . .

Id. at 10. The court finds that defendant's enunciated policy and regulations governing the reappointment decision explicitly informed plaintiff that her reappointment would be discretionary, subject to both subjective evaluations and the needs of the university, apart from the merits of her own case. Accordingly, the court

concludes that plaintiff had no "legitimate claim of entitlement" to reappointment, Roth, 408 U.S. at 577, and hence the requirements of procedural due process do not apply to defendant's denial of her application for reappointment.

Plaintiff contends that the argument that she lacks a liberty interest in reappointment ignores the fact that defendant allegedly repeatedly violated its own policies and procedures. However, as the Varma court made clear, arguments that the University did "not properly consider the promotion criteria or follow the correct procedures in evaluating candidates" is irrelevant to the issue at hand:

> the question before the court is not whether the [reappointment] decisions of the University are correct; . . . The question presented here

> is whether a protected property interest in tenure has been created.

Varma, 721 F. Supp. at 71. Defendant's alleged procedural violations, if they occurred, do not establish a due process violation in the absence of a showing that a protected liberty or property interest was at stake. Accordingly, plaintiff's Ninth Count, claiming due process violations of the Fifth and Fourteenth Amendments, will be dismissed.

Violation of New Jersey Public Policy

In the Eleventh and final Count of her complaint, plaintiff alleges that her nonreappointment, salary level, and nonhiring at GSM were in violation of the public policy of the State of New Jersey, and that she is therefore entitled to damages. Under Pierce v. Ortho Pharmaceutical Corp., 84 N.J. 58, 72

(1980), a plaintiff must identify a "clear mandate of public policy" in order to have a cause of action for wrongful discharge. However, courts will not entertain a separate common law action for wrongful discharge where specific statutory remedies for the same alleged injuries are available. See Pierce v. New Process Co., 580 F. Supp. 1543, 1546 (W.D. Pa. 1984), aff'd, 749 F.2d 27 (3d Cir. 1984); Helman v. AMF, Inc., 675 F. Supp. 1163 (S.D. Ind. 1987). Accordingly, because Title VII, the ADEA, and the New Jersey Law Against Discrimination afford available remedies for plaintiff's cause of action for alleged sex and age discrimination, a pendent common law claim for violation of public policy cannot be maintained. See Reeder-Baker v. Lincoln National Corp., 644 F. Supp. 983 (N.D. Ind. 1986).

However, plaintiff also alleges that Rutgers' decision not to rehire her was taken in part in retaliation for her having exercised her First Amendment rights and that this represents an independent violation of public policy. Even where an individual does not have a right to continuing employment, a public employer's decision not to rehire or to discharge may not be based cn the employee's exercise of constitutionally protected First Amendment freedoms. Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274, 283-284 (1977). As the United States Supreme Court has held, a balance must be struck between the interests of a public employee as a citizen to comment upon matters of public concern and the interest of the particular governmental agency in promoting the efficiency of the public services it performs through its

employees. Pickering v. Board of Education, 391 U.S. 563, 568 (1968). However, "[w]hen employee expression cannot be fairly considered as relating to any matter of political, social, or other concern to the community, government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary." Connick v. Myers, 461 U.S. 138, 146-47 (1983).

Fisher alleges that her evaluation in the "General Usefulness" category was lowered because the category included consideration of her service on the Teaching Development Committee, and, in that capacity, she espoused unpopular views, denouncing the classroom visitation policy, the required heavy teaching loads, the limited resources available to the FASN business faculty,

the changing of grades without their consultation, and the University grading policy. Further, she claims that her "Teaching Effectiveness" rating was lowered because it was based on student evaluations, and that she had prompted complaints about her teaching by instituting disciplinary action against students cheating in her classes. Defendant contends that by her own admission, plaintiff's speech related solely to internal departmental affairs, not to matters of public interest or policy, and hence even had she been denied reappointment because of it, she would have no cause of action for violation of public policy.

The court need not reach the question of whether the issues allegedly raised by plaintiff to the Teaching Development Committee are matters of

public concern implicating First Amendment values under the Pickering analysis. For, assuming that they do involve matters of public concern, the court would dismiss plaintiff's public policy claims on a different ground: plaintiff has submitted no competent evidence that would reasonably support an inference that her espousal of unpopular views had any affect on her reappointment evaluation. Fisher has merely asserted that she received a low score in a category including consideration of the role in which she expressed those views. In fact, Fisher received a "below average" rating in General Usefulness only in her evaluation by the Appointment and Promotions Committee, the intermediate reviewing body. Both the Department Personnel Committee and Dean Hosford, the first and final stages of

the review process, gave Fisher an average rating for General Usefulness. Hosford Aff., Ex. 23 Forms. No. 4-6. The Department Personnel Committee supported its rating by observing that Fisher had "served on the Teaching Development Committee." Id., Form No. 4. Hosford wrote that "[t]aken altogether, and considering the fact that the candidate was on FASP leave and away from campus for a year, the evidence of involvement and contribution to the academic community is sufficient." Id., Form No. 6. Further, Hosford averred that "given the lesser importance of [the] criterion" of the category of General Usefulness, Fisher's average ranking in it "did not provide a counterbalance to plaintiff's deficient record in scholarly or creative activity and research accomplishments." Hosford Aff. ¶ 58.

Thus, defendant has proffered legitimate reasons for its evaluation of plaintiff in the General Usefulness category, demonstrated that plaintiff was not ranked below average in this respect in her final evaluation by Dean Hosford, and submitted evidence supporting the view that her rating in this category had, in any event, little impact on the reappointment decision. In the face of this showing plaintiff has produced nothing but unsupported speculation. In particular, plaintiff has produced no evidence from which a trier of fact could infer either that defendant harbored ill will against Fisher for her comments to the Teaching Development Committee or that its employment decisions were based in any way on comments made by Fisher to that committee. The "mere existence of a scintilla of evidence in support of the

plaintiff's position will be insufficient" to defeat a motion for summary judgment, where "reasonable jurors" could not "find by a preponderance of the evidence that the plaintiff is entitled to a verdict." Anderson v. Liberty Lobby, 477 U.S. 242, 252 (1986). Much less will a motion for summary judgment be denied where, as here, plaintiff has provided not even a scintilla of evidence, but raised merely metaphysical doubts about the legitimate reasons proffered by a defendant for its reappointment evaluations and employment decisions.

Similarly, the court also finds that plaintiff's allegation that she suffered First Amendment retaliation by virtue of her decision to report student plagiarism fails to state a claim for violation of New Jersey public policy. Plaintiff does

not claim that defendant failed to reappoint her in retaliation for reporting the plagiarism, but merely that defendant relied on the baseless criticisms of third parties whose adverse assessment may have been motivated by retaliation. Defendant has submitted unrebutted evidence that it did not rely on these potentially tainted student evaluations.[16] Further, the majority of her reviewers at every level ranked Fisher's Teaching Effectiveness as average. Hosford Aff., Ex. 23, Forms No. 4-6. Explaining its ranking, her department committee stated that student

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16. Fisher's Department Personnel Committee Evaluation states that "[t]he Department understands that assessment provided by students who have been accused of cheating may be totally misleading. We reviewed the student assessments with that in mind. . . ." Fisher Reappointment Packet, Form 4 (Hosford Aff., Ex. 23).

assessments that her courses were of below average difficulty were "puzzling in view of Professor Fisher's view that students are very poorly prepared for the courses." Id., Form No. 4. While noting her "serious concern for student learning," Hosford stated that "it is not clear that Dr. Fisher has set sufficiently demanding standards for her courses or that she has developed fully effective teaching strategies for the students this institution serves." Id., Form No. 6.

Thus, the court concludes that defendants have proffered unrebutted legitimate reasons for their ranking of plaintiff's Teaching Effectiveness, and, in the face of plaintiff's unsupported claims of bias, have submitted admissible evidence that any adverse student reviews resulting from plaintiff's reports of

student plagiarism did not taint defendant's evaluation. Plaintiff's claims of retaliation are rendered further incredible in view of the fact that she did not receive a below average rating for teaching ability. Finally, even assuming that defendants had relied on student recommendations motivated by retaliation, the court finds no basis for deeming this a violation of plaintiff's First Amendment rights, even if it represented a flawed evaluative process, absent any allegation that defendant refused to reappoint plaintiff because she reported the plagiarism. Accordingly, the court will dismiss Fisher's public policy claims in their entirety.

Conclusion

For the foregoing reasons,

defendant's motion for summary judgment will be granted, and plaintiff's claims will be dismissed in their entirety.

H. LEE SAROKIN, U.S.D.J.

Date: August 5, 1992

Original to: Clerk, U.S. District Court

Copies to: Joel A. Pisano,
U.S. Magistrate Judge

Aron M. Schwartz, Esq.
Vogel, Chait, Schwartz and Collins
77 Headquarters Plaza
North Tower
Morristown, NJ 07960

Stephen J. Edelstein
Schwartz, Simon & Edelstein
293 Eisenhower Parkway
Suite 300
Livingston, NJ 07039

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

LOIS A. FISHER,	:	Civ. No. 90-503 (HLS)
Plaintiff,	:	ORDER
vs.	:	
RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,	:	
Defendant.	:	

This matter having come before the court upon defendant's motion for summary judgment; and the court having considered the submissions of the parties and the arguments of counsel; and for the reasons expressed in the accompanying opinion; and for good cause shown,

It is on this 5 day of August, 1992, hereby

ORDERED that defendant's motion for summary judgment be and hereby is

granted; and it is further

ORDERED that this matter be and hereby is dismissed.

H. LEE SAROKIN, U.S.D.J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 92-5473 and 92-5497

LOIS FISHER

v.

RUTGERS, THE STATE UNIVERSITY
OF NEW JERSEY

Lois A. Fisher
Appellant

SUR PETITION FOR REHEARING

BEFORE: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS, and SEITZ

Circuit Judges

The petition for rehearing filed by appellant in the above-entitled cases having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular

active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

_____

Circuit Judge

Dated: July 13, 1993

SUPREME COURT OF THE UNITED STATES

NO.

A-152

Lois Fisher,

Petitioner

v.

Rutgers, State University of New Jersey

O R D E R

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including October 22, 1993.

/S/ David H. Souter
Associate Justice of the
Supreme Court of the United
States

Dated this 17th
day of August, 1993.